Judgment No. SC 26/03
Civil Appeal No. 254/02

GAUNTLET SECURITY SERVICES (PRIVATE) LIMITED

v GEORGE MUBAIWA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JULY 10 & OCTOBER16, 2003

J B Colegrave, for the appellant

The respondent in person

GWAUNZA JA: This is an appeal against the judgment of the Labour Relations Tribunal ("the Tribunal"), in terms of which the appellant was ordered to reinstate the respondent to his job, with no loss of salary and benefits, with effect from the date of his suspension. In the event that reinstatement was no longer possible, the appellant was ordered by the Tribunal to pay the respondent damages in lieu of reinstatement. The quantum of the damages was either to be agreed between the parties or, in the case of disagreement over the issue, determined by the Tribunal.

The background to the dispute is as follows. The respondent was employed as a security guard by the appellant. On the night of 30 April 1998 the respondent was on guard duties at No. 32 James Martin Road in Southerton. An "in-house" guard, by the name of Mutamiri, was also on duty guarding the same premises. Mutamiri alleged he had observed the respondent trying to fish out

clothing material through the window of the factory that he was guarding. He was using a piece of wire which, when confronted by Mutamiri, he is alleged to have indicated he had thrown into the tall grass. Mutamiri alleged that the respondent confessed to an attempt to steal the material and asked for forgiveness. The respondent is said to have repeated the same confession to Mutamiri and another guard called Tinarwo, a Commando security guard, who had been called by Mutamiri. Later, when a certain lance corporal for the appellant company, referred to only as John, came to the premises on one of his rounds, he was briefed by Mutamiri about the incident. Both Mutamiri and Lance Corporal John alleged the respondent had admitted trying to steal the material and asked for forgiveness. Lance Corporal John wrote a report on the incident, and invited the respondent to sign it. The respondent refused to do so.

The matter was duly reported to the authorities within the appellant company. The respondent received, but refused to sign, a notification of suspension pending investigations. A disciplinary hearing was thereafter held, at which the respondent denied trying to fish out the material or confessing to this effect before Mutamiri, the Commando security guard or Lance Corporal John. Only the latter gave evidence, Mutamiri and the Commando security guard not having been called. The disciplinary committee went to the factory premises in question for an inspection *in loco* and concluded it was quite possible for one to fish material out of the window in the manner alleged. They accepted the evidence of Lance Corporal John against that of the respondent and found him guilty, a finding that carried the penalty of dismissal.

The respondent refused to sign the dismissal form and appealed to the local joint committee of the National Employment Council for the Commercial Sector ("NECCS"). The appeal was upheld, it being the finding of the joint committee that the appellant *in casu* had failed to prove its case against the respondent. The appellant was ordered to reinstate the respondent.

The appellant then appealed against this decision, and the appeal was heard before the Negotiating Committee of the NECCS. The Negotiating Committee dismissed the appeal, it being noted on its behalf:

> "From the evidence above, the negotiating committee noted that it was Lance Corporal John's word against that of the respondent. There is no other evidence to support what Lance Corporal John has outlined. In the absence of supporting evidence from Mutamiri and Tinarwo, the employee is given the benefit of the doubt."

It is against this decision that the appellant appealed to the Tribunal.

The chairman of the Tribunal, Mr Bhunu, was satisfied the negotiating committee had properly not placed any weight on Lance Corporal John's evidence because it was both uncorroborated and, to a large extent, hearsay. He also found it did not help the appellant's case that no attempt had been made by Mutamiri or Lance Corporal John to find the piece of wire the respondent had allegedly thrown into the tall grass after unsuccessfully trying to fish out material through the window. He dismissed the appeal, after noting at p 2 of the judgment:

> "That being the case, the negotiating committee was correct in according the respondent the benefit of the doubt."

The appellant's original grounds of appeal made no reference to the appeal being on a point of law as was required by s 92(2) of the Labour Relations Act, which was then applicable. The appellant then successfully applied for leave to amend the original grounds of appeal to include a new ground reading as follows:

> "The learned chairman of the Labour Relations Tribunal erred in law in holding that the appellant was required to prove its case for the dismissal of the respondent beyond reasonable doubt, rather than upon a balance of probabilities."

Mr *Colegrave*, who appeared for the appellant, sought to persuade the Court that the use of the phrase "reasonable doubt" by the chairman of the Tribunal was influenced by the fact that however the original charge against the respondent was framed, the latter was, in effect, dismissed because of an attempted theft. That being the case, Mr *Colegrave* contended, it could very well be that the chairman considered the "court *a quo*" (*sic*) was correct in dealing with the case upon the basis of proof beyond reasonable doubt.

I have searched in vain for any indication in the judgment of Mr Bhunu that he at any time held that the appellant was required to prove its case beyond "reasonable doubt". The only reference to reasonable doubt in that judgment is found in the notation cited above, where Mr Bhunu expressed agreement with the negotiating committee's decision to give the respondent the benefit of the doubt. There is, in my view, nothing to suggest that the word "doubt" was used in the context of, or to denote, the burden of proof that the appellant, as the respondent's employer, bore.

While the chairman of the Tribunal might have at the back of his mind kept the thought that the case before him, being a civil matter, had to be proved on a balance of probabilities, he did not make any reference to this burden having been discharged. Certainly, he did not hold that the appellant was required to prove its case beyond a reasonable doubt.

I find, in the result, that there is no basis for the allegation that the chairman of the Tribunal held that the appellant was required to prove its case beyond a reasonable doubt.

The appellant cited two other grounds of appeal. It has, however, not been asserted in relation to these grounds that they were on a point of law. That it was not intended to make that averment is in effect suggested by the appellant's application to introduce the new ground – now discredited – pertaining to the burden of proof that the appellant bore.

It is trite that appeals against decisions of the Tribunal can only be on questions of law. This Court, in a long range of decisions (see, for instance, *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217; *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S); *Mpumela v Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146 (S)), has set down the general test to be applied in determining whether the point appealed against is one of fact or law. Some findings of the Tribunal are clearly points of law. Others, which ordinarily would have been points of fact, become points of law by virtue of being so outrageous in their defiance of logic as to amount

to a serious misdirection. This point was emphasised by EBRAHIM JA in *National Foods Ltd v Mugadza* SC-105-95, when he commented:

> "It is true that this Court only has jurisdiction to hear an appeal from the Tribunal on a point of law. But clearly if there is a serious misdirection on the facts it amounts to a misdirection in law. The giving of reasons that are bad in law constitutes a failure to hear and determine according to law."

An allegation of this nature has not been made in relation to the appellant's other grounds of appeal. Even had it been so made, I have little doubt the appellant would have had considerable difficulty in proving it.

In the first ground of appeal, the appellant alleges misdirection on the part of the Tribunal, in that the chairman made a final ruling on the matter without first affording the appellant the opportunity of calling Mutamiri and the Commando security guard. The appellant brought charges against the respondent. The burden of gathering enough evidence to prove the case against the respondent clearly lay with the appellant. By not securing the evidence of Mutamiri and the Commando security guard, the appellant ran the risk of not being able to place evidence that was crucial to its case before, firstly, the negotiating committee and, thereafter, the Tribunal. A finding based on the clearly insufficient facts and evidence placed before the court *a quo*, that the respondent should be given the benefit of the doubt, in my view, does not amount to a misdirection.

The appellant claims, lastly, that the chairman of the Tribunal erred in finding it improbable that Mutamiri and Lance Corporal John would have failed to arrest the respondent and report the matter to the police if the respondent had indeed been caught red-handed and admitted his guilt. This was clearly a finding based on

facts. Arresting a thief caught virtually red-handed is a normal consequence of detection. I do not consider the finding to be so outrageous or so irrational as to amount to any misdirection. It cannot, in my view, be said of that finding that "no sensible person who had applied his mind to the question to be decided" would have arrived at it. (*Bitcon v Rosenberg* 1936 AD 380 at 397).

In the light of the foregoing, I find that the appellant has failed to show that the appeal was on any points of law. Such an appeal must therefore fail.

It is, in the premises, ordered as follows –

"The appeal is dismissed with costs."

SANDURA JA: I agree.

MALABA JA: I agree.

Coghlan, Welsh & Guest appellant's legal practitioners